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No. 99-359

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

DONALD LANDRY, et al., *Petitioners,*

v.

THOMAS F. REILLY, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS F. REILLY
Attorney General of Massachusetts

PAMELA L. HUNT*
Assistant Attorney General

CATHERINE E. SULLIVAN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200
**Counsel of Record*

Issue Presented

Should this Court grant certiorari to review an interlocutory decision of the Massachusetts Supreme Judicial Court vacating a preliminary injunction against enforcement of a narrowly-drafted DNA database statute, where there is no conflict among the federal circuit courts of appeal or the state appellate courts as to the reasonableness under the Fourth Amendment of obtaining DNA samples from a defined group of convicted persons for identification purposes, and where the underlying state civil action has gone to final judgment and the time for appeal has expired?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Thomas F. Reilly, the Attorney General for the Commonwealth of Massachusetts; Carl M. Selavka, Director of the Massachusetts State Crime Laboratory; Reed Hillman, Superintendent of the Massachusetts Department of State Police; Sheila Hubbard, Chair of the Massachusetts Parole Board; Michael Maloney, Commissioner of the Massachusetts Department of Correction; and John O'Brien, Massachusetts Commissioner of Probation, respectfully request that this Court deny the petition for writ of certiorari.

Opinion Below

In *Landry v. Attorney General*, 429 Mass. 336, 709 N.E.2d 1085 (1999), the Massachusetts Supreme Judicial Court vacated the entry of a preliminary injunction against enforcement

of the Massachusetts DNA[1] database statute, holding that the statute's provision for obtaining DNA samples from certain convicted persons was reasonable under the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights. The Court remanded the case to the Superior Court for further proceedings. On remand, the Superior Court dismissed the case, and petitioners took no appeal.[2]

Statement of the Case

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Petitioners seek a writ of certiorari to the Massachusetts Supreme Judicial Court to review that Court's decision vacating a preliminary injunction against enforcement of the Massachusetts DNA database statute, 1997 Mass. Acts ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997), on the ground that the statute's provisions regarding collection of DNA samples from certain persons convicted of crimes are reasonable under the Fourth Amendment. Because the issue raised by the preliminary injunction has been mooted by the entry of final judgment, and because the Supreme Judicial Court's decision is consistent with the decisions of this Court and of every other appellate court that has addressed the issue, the petition should be denied.

The petitioners filed their complaint in the Middlesex County Superior Court on February 2, 1998. In the complaint, as amended on February 17, 1998, petitioners sought a declaration that the Massachusetts DNA Database statute, 1997 Mass. Acts

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[1]Deoxyribonucleic acid.

[2] Both the Supreme Judicial Court's opinion and the Superior Court's order entering the preliminary injunction have been reproduced in the petitioners' Appendix. References to the petitioners' Appendix will be abbreviated (Pet. App. at), and references to the respondents' Appendix, *post*, will be abbreviated (Resp. App. at).

ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997) ("the Act") (reproduced in Pet. App. at 52a-60a), which requires persons convicted of designated criminal offenses to submit DNA samples to the State Police, violated, *inter alia*, the Fourth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, and the Ex Post Facto Clause of the United States Constitution, as well as cognate state provisions, including Article 14 of the Massachusetts Declaration of Rights. Petitioners also sought preliminary and permanent injunctive relief from enforcement of the Act.

On February 9, 1998, the Superior Court entered its first order preliminarily enjoining enforcement of the Act on the ground that regulations governing the collection, analysis, and dissemination of DNA samples were required. Even after such regulations were promulgated on an emergency basis,[3] the Superior Court declined to vacate the preliminary injunction. On April 7, 1998, while an appeal from that order was pending, the petitioners moved again for a preliminary injunction on the constitutional grounds raised in the amended complaint. Additional regulations governing the analysis and dissemination of DNA samples were promulgated on July 29, 1998.[4]

On August 14, 1998, the Superior Court entered its second order preliminarily enjoining enforcement of the Act, relying on the Fourth Amendment and the corresponding state constitutional provision, Article 14 of the Massachusetts Declaration of Rights. The respondents took an interlocutory appeal to the Massachusetts Appeals Court under Mass. Gen. Laws ch. 231, § 118, and the Massachusetts Supreme Judicial Court ordered the case transferred to that Court on November 17, 1998.

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[3]*See* 515 C.M.R. §§ 1.00-1.06, reproduced in Pet. App. at 61a-71a.

[4]*See* 515 C.M.R. §§ 2.00-2.16, reproduced, *post*, in Resp. App. at 8a-25a.

On April 13, 1999, the Supreme Judicial Court issued its decision vacating the preliminary injunction on the grounds that the Act's provisions for obtaining DNA samples from persons convicted of designated offenses were reasonable, both under the Fourth Amendment and under Article 14 of the Massachusetts Declaration of Rights, and holding that additional regulations regarding "reasonable force" were not required. *Landry v. Attorney General*, 429 Mass. 336, 338, 347-352, 709 N.E.2d 1085, 1087,1092-1095 (1999). The Court remanded the case to the Superior Court for further proceedings.

The Superior Court entered a judgment of dismissal on May 26, 1999, and denied a motion to reconsider on July 9, 1999. Petitioners claimed no appeal, and the time for appeal has expired.

II. FACTS

A. *The Massachusetts DNA Database Statute*

The Massachusetts Legislature enacted the DNA database statute on September 30, 1997. 1997 Mass. Acts ch. 106, codified in part at Mass. Gen. Laws ch. 22E, §§ 1-15 (1997) (Pet. App. at 52a-60a). Its stated purposes are to assist law enforcement agencies in:

> (1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from, criminal investigation or prosecution; and (3) searching for missing persons.

Id. § 1.

Effective December 29, 1997, the Act requires persons who are convicted of any of thirty-three designated crimes to submit DNA samples within ninety days of conviction. Mass. Gen. Laws ch. 22E, § 3. There is no exception for pending appeals or postconviction motions, *id.*, but if a conviction is reversed and the charges dismissed, relevant DNA records may be expunged by court order. *Id.* § 15.

The Act further requires that persons who had previously been convicted of any offense specified in § 3 and who were incarcerated on the effective date must provide a DNA sample "within 90 days of the effective date of this act or prior to release from custody, whichever first occurs." 1997 Mass. Acts ch. 106, § 8.[5] The same ninety-day deadline applies to persons on probation or parole "as a result of a conviction or judicial determination resulting from a charge of any of the [designated offenses]." *Id.* The failure to furnish a required sample is punishable by a fine of up to $1,000 or up to six months imprisonment. *Id.* § 11.

Pursuant to the Act and regulations, Mass. Gen. Laws ch. 22E, § 4(a) and 515 C.M.R. § 1.04 (1998), medical or licensed personnel collect DNA samples by pricking the offender's finger with a sterile lancet.

The Act limits access to and use of the information obtained from DNA samples. Mass. Gen. Laws ch. 22E, §§ 6-10. All DNA samples are to be forwarded to the crime laboratory director "for the purpose of DNA analysis," *id.* § 6. That analysis is defined as the generation of "numerical identification information," *id.* § 1. As the regulations make clear, this information may be derived only from STR[6] testing, 515 C.M.R. § 2.04(1) (Resp. App. at 13a). STR loci are "particularly appropriate for forensic use" because they do not reveal general genetic information. National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996). Moreover, DNA records are confidential and may be disclosed only as authorized by the Act. *Id.* § 9. The Supreme Judicial Court has construed the provisions of the Act regarding dissemination to law enforcement

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[5]This provision was upheld in *Murphy v. Department of Correction*, 429 Mass. 736, 744, 711 N.E.2d 149, 156 (1999).

[6]Short tandem repeat.

agencies to be limited to identification information only. *Landry*, 429 Mass. at 353 n.18, 709 N.E.2d at 1096 n.18.[7]

The Act imposes strict penalties for violations of its provisions. Any person who has information from the DNA database "by virtue of employment or official position," and "purposely discloses" it to any unauthorized person or agency is subject to a fine or imprisonment. Mass. Gen. Laws ch. 22E, § 12. Unlawful possession of DNA information is a criminal offense, as is tampering, or attempting to tamper, with DNA information. *Id.* §§ 13-14.[8]

B. *Implementation of the Statute*

Petitioners Gallello, Hallett, and Pironti were incarcerated for offenses designated in Mass. Gen. Laws ch. 22E, § 3, as of December 29, 1997. On January 24, 1998, the respondents, through trained medical personnel, collected DNA samples from them. Petitioners Landry, Cartagena, Troisi, and Pistorino were either on parole or probation with respect to designated offenses as of December 29, 1997. The respondents notified each of them of their obligation to provide a DNA sample and instructed them to call a toll-free number to schedule an appointment to provide a DNA sample. The record is silent as to whether any of the latter four has provided a DNA sample.

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[7] The petitioners exclude from their Appendix all the regulations relating to limitations on DNA analysis and dissemination found in 515 C.M.R. §§ 2.00-2.16 (reproduced in Resp. App., *post*, at 8a-25a). Petitioners' claims that "multiple genetic tests . . . can be conducted into the foreseeable future" (Petition at 4) and that DNA analysis "may disclose a person's entire genetic makeup" (Petition at 25) are contradicted by the limitation to STR testing for identification information only, and by the Act's restrictions on use and dissemination of the identification information.

[8] Disclosure to an unauthorized person is subject to a fine of up to $1,000 or imprisonment for not more than six months, as is unauthorized use of DNA information, while tampering is punishable by a fine of up to $5,000, imprisonment for up to five years, or both. Mass. Gen. Laws ch. 22E, §§ 12-14.

Contrary to the suggestions in the petition (Petition at 19), multiple sites and times were made available for sample collection, and persons calling the toll-free number were "given the opportunity to select the site and date most convenient for them and to reschedule their appointments if necessary" (Affidavit of David I. Ranieri, Resp. App. at 4a). Moreover, while reasonable force is authorized by the Act, Mass. Gen. Laws ch. 22E, § 4(a), the record contains nothing to support petitioners' suggestions that force was actually used to extract samples from petitioners (Petition at 6). To the contrary, petitioners Gallello, Hallett, and Pironti allege in the amended complaint that they submitted, albeit involuntarily, to the finger-prick extraction.[9]

Approximately 1,250 DNA samples were collected prior to the issuance of the first preliminary injunction on February 9, 1998. When the first injunction went into effect in February, 1998, the crime laboratory director was forced to cancel over 1,000 appointments that probationers and parolees had made to provide DNA samples. During the month of February 1998, while the injunction remained in effect, about 200 inmates, probationers, and parolees required to submit DNA samples were released from the custody and supervision of the Commonwealth without having submitted samples.

Collection of samples has resumed since vacation of the preliminary injunction and dismissal of the case in May 1999.

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[9]Similarly, there is nothing in the record indicating that samples were taken from persons not covered by the Act (see Petition at 6). The lower court judge may have been referring to the application of the Act to incarcerated persons with prior records for designated offenses, a category that the Supreme Judicial Court has since held to be plainly within the Act. *Murphy v. Department of Correction*, 429 Mass. at 744, 711 N.E.2d at 156.

Reasons for Denying the Writ

Petitioners are seeking review on certiorari of an interlocutory decision of the Massachusetts Supreme Judicial Court, vacating a preliminary injunction against enforcement of the Massachusetts DNA database statute. Not only is the appeal moot, as final judgment has entered, but the Supreme Judicial Court's decision is fully consistent with the decisions of this Court and of every other federal and state appellate court that has addressed the issue.

I. NO REASON FOR CERTIORARI REVIEW EXISTS WHERE THE SUPREME JUDICIAL COURT'S DECISION UPHOLDING MASSACHUSETTS' DNA DATABASE STATUTE AS REASONABLE UNDER THE FOURTH AMENDMENT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF EVERY FEDERAL CIRCUIT COURT AND STATE APPELLATE COURT THAT HAS ADDRESSED THE ISSUE.

A. *The Appellate Cases are Not in Conflict.*

The Court should not grant the writ of certiorari in this case because there is no conflict in the federal or state appellate caselaw, which is unanimous in upholding the reasonableness under the Fourth Amendment of obtaining DNA samples from persons convicted of designated offenses for the purpose of creating identification information.

All fifty states have passed legislation authorizing the collection of DNA samples from criminals convicted of designated crimes and are eligible to participate in the nationwide sharing of DNA identification information. Nicholas Wade, *F.B.I. Set To Open Its DNA Database for Fighting Crime*, N.Y. Times, Oct. 12, 1998, at A1, A16. Every federal and state appellate court that has considered a challenge to a statute authorizing seizure of DNA

samples on Fourth Amendment grounds has upheld the statute. *See Roe v. Marcotte*, 193 F.2d 72, 1999 WL 731599 at *6-9 (2d Cir. 1999); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997); *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1554 (1996); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992); *People v. Wealer*, 264 Ill. App.3d 6, 17, 636 N.E.2d 1129, 1137, *appeal denied*, 264 Ill. 2d 519, 642 N.E.2d 1299 (1994); *Cooper v. Gammon*, 943 S.W.2d 699, 704-705 (Mo. Ct. App. 1997); *State ex rel. Juvenile Dep't v. Orozco*, 129 Or. App. 148, 153-154, 878 P.2d 432, 434 (1994) (en banc), *review denied*, 326 Or. 58, 944 P.2d 947 (1997); *State v. Olivas*, 122 Wash.2d 73, 98, 856 P.2d 1076, 1093 (1993) (en banc).

B. *The Supreme Judicial Court's Decision Is Fully Consistent with the Holdings of This Court.*

The petitioners do not attempt to claim that there is a split among the lower federal courts or state appellate courts on this issue. Rather, they argue that the decision of the Massachusetts Supreme Judicial Court, and by implication all the above decisions, conflict with the holdings of this Court, particularly those in *Schmerber v. California*, 384 U.S. 757, 768 (1966) and *Winston v. Lee*, 470 U.S. 753, 761 (1985). In *Schmerber*, this Court required a showing of probable cause to believe a suspect had committed a crime before blood could be withdrawn involuntarily to determine intoxication. In *Lee*, this Court, following the reasoning of *Schmerber*, required a showing of both probable cause and compelling need before surgery could be ordered to remove a bullet from a suspect. The petitioners argue that these cases, and others in which searches or seizures were sought based on varying degrees of individualized suspicion focusing upon a particular suspect,[10] stand for the proposition that

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[10]E.g., *Terry v. Ohio*, 392 U.S. 1, 21n.18 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 91-92 (1979); *Cupp v. Murphy*, 412 U.S. 291, 294-296 (1973).

extraction of a blood sample in any context relating to crime detection is prohibited in the absence of probable cause. Petition at 12-23.

This argument is simply incorrect. Both *Schmerber* and *Lee* involved criminal investigations in which the purpose of the seizures was to link a suspect with a particular crime. These cases do not address the reasonableness of obtaining a blood sample solely for other legitimate governmental purposes.[11]

The petitioners virtually ignore this Court's decisions regarding the evaluation of reasonableness of seizures under the Fourth Amendment in circumstances where there is not an ongoing criminal investigation in which a particular person is sought to be connected to the crime. The Supreme Judicial Court's decision is entirely consistent with these decisions, which hold that:

> [A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989) (upholding mandatory breath, blood, and urine sampling of railroad workers); *see National Treasury Employees Union v. Von*

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[11]The petitioners attempt to bring the Act within the holdings of *Schmerber* and *Lee* by arguing that the obtaining of DNA samples must be seen not only as the collection of identification information regarding convicted persons, but also as part of the process of identifying a suspect in a criminal investigation, regardless of whether any "match" ever occurs (Petition at 10-11). This is sophistic -- the DNA samples are not collected as part of an ongoing criminal investigation, but in order to create a vehicle for later identification, exactly as fingerprints are collected.

Raab, 489 U.S. 656, 665 (1989) (upholding mandatory urinalysis of certain Customs Service employees; "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

Under these cases, in circumstances where it is not possible to rely upon individualized suspicion,[12] the reasonableness of a suspicionless search under the Fourth Amendment, is evaluated by balancing the importance of the governmental interest involved against the justifiable privacy interests at stake. *See Skinner*, 489 U.S. at 628 (balancing compelling need for safe operation of trains against limited threats to covered employees' expectations of privacy).

The Massachusetts Supreme Judicial Court properly followed this analysis. The Court held:

> The State has an established and indisputable interest in preserving a permanent identification record of convicted persons for resolving past and future crimes and uses fingerprints, and now will use DNA identification, for these purposes. The obtaining of a very small amount of blood by pin prick constitutes only a minimally intrusive search. The balance of interests clearly weighs in favor of the use of DNA in accordance with the Act to create a record of identification.

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[12]Patently, the creation of DNA databases "would be placed in jeopardy by a requirement of individualized suspicion," *Skinner*, 489 U.S. at 624. The petitioners do not attempt to argue that, in collecting DNA samples from designated prisoners, parolees, and probationers in order to create a data bank of their identification information for use in solving crimes and missing person cases in the future, it is possible to develop individualized suspicion at the time of collection. Indeed, the crimes sought to be solved may not yet have been committed. A DNA database comprised only of samples collected from suspects in connection with particular investigations would be virtually useless.

Landry v. Attorney General, 429 Mass. 336, 347, 709 N.E.2d 1085, 1092 (1999) (citations omitted). This holding correctly applied the decisions of this Court. That DNA databases serve "an important governmental interest," *Skinner*, 489 U.S. at 624, is beyond dispute. The extreme accuracy of DNA identifying information not only permits cases to be solved with a high degree of reliability, even where there had been no suspect, but also permits persons to be eliminated from suspicion. DNA analysis enables crimes to be solved based upon extremely small samples of bodily fluids, skin, or hair follicles, a particularly useful quality where criminals may go to great efforts to conceal their identities. *See Jones v. Murray*, 962 F.2d at 307. Moreover, the fear of unwittingly leaving behind tiny amounts of incriminating evidence may deter crime. *See Rise v. Oregon*, 59 F.3d at 1561 & n.4.

The Supreme Judicial Court correctly balanced this governmental interest in "a particularly reliable form of identification," *Landry*, 429 Mass. at 345, 709 N.E.2d at 1091, against the particular privacy interests implicated by the search and the intrusiveness of the seizure, *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 671-72; *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990). *See Landry*, 429 Mass. at 345, 709 N.E.2d at 1091.

Citing decisions of this Court, the Supreme Judicial Court properly held that the degree of intrusion involved in a blood test, especially one accomplished, as here, by a finger prick,[13] is minimal. *Id.* at 347, 709 N.E.2d at 1092; *see Schmerber*, 384 U.S. at 771; *Skinner*, 489 U.S. at 625 and cases cited; *cf. Lee*, 470 U.S. at 761-62, 766-67 (contrasting minimal intrusion of blood test with substantial intrusion of proposed surgery to retrieve bullet).

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[13]Under the DNA database statute and Department of State Police regulations, DNA samples are collected by medical or licensed personnel. The offender's finger is pricked using a sterile lancet and between two and eight drops of blood are allowed to fall on specialized paper that bonds DNA. *See* 515 C.M.R. § 1.04 (3).

As to privacy, the Supreme Judicial Court correctly held that "convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity." *Landry*, 429 Mass. at 345, 709 N.E.2d at 1091; *see Jones v. Murray*, 962 F.2d at 306. This Court has recognized that persons convicted of crime have a lesser expectation of privacy than do ordinary law abiding citizens, even with respect to their bodily integrity. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (convicted prisoners not protected from routine searches of body cavities and jail cells); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (permitting body cavity search of inmates for contraband); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (permitting search of probationer's house, without probable cause or a warrant, to search for contraband); *see Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (in upholding HIV testing against inmate's Fourth Amendment challenge, stating that "plaintiff's privacy expectation in his body is further reduced by his incarceration"). As the court stated in *Rise v. Oregon*, 59 F.3d at 1560:

> Once a person is convicted of [a serious crime], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.

Id. at 1560. Especially in light of the stringent limitations on the analysis and dissemination of DNA samples in the regulations promulgated pursuant to the Massachusetts DNA database statute (*see* Resp. App., *post*, at 8a-24a), a convicted person has no reasonable expectation of privacy in the identification information generated from the sample, which can reveal no other genetic information.[14]

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[14]STR identity testing involves loci that do not reveal general genetic information, and is thus well suited for forensic work. *See* National Research Council, The Evaluation of Forensic DNA Evidence 117 (1996).

C. *The "Special Needs" Doctrine Also Supports the Supreme Judicial Court's Decision.*

The petitioners argue that, under *Chandler v. Miller*, 520 U.S. 305, 308-09 (1997), a balancing test or "special needs" analysis may not be undertaken in this case because law enforcement interests are at stake (Petition at 21-23). This argument misconstrues *Chandler*.

The Supreme Judicial Court recognized in *Landry* that some courts have upheld DNA database statutes based on the "special needs" doctrine under the Fourth Amendment, *see, e.g.*, *Roe v. Marcotte*, 193 F.2d 72, 1999 WL 731599 at *6-9 (2d Cir. 1999); *State v. Olivas*, 122 Wash.2d 73, 98, 856 P.2d 1076, 1093 (1993) (en banc). *Landry*, 429 Mass. at 345-46, 709 N.E.2d at 1091-92. Although the Court did not reach the issue, relying instead on the "balancing" test under *Skinner*, this doctrine also supports its decision.

The "special needs" doctrine recognizes that "[s]earches conducted without grounds for suspicion of particular individuals have been upheld . . . in certain limited circumstances." *Chandler v. Miller*, 520 U.S. at 308-09 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Brown v. Texas*, 443 U.S. 47, 50 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)). The *Chandler* Court also quoted from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) (*see supra* at 10), holding that, where privacy interests are minimal and an important governmental interest would be jeopardized if a requirement of particularized suspicion were imposed, "a search may be reasonable despite the absence of such suspicion." *Id.*

In *Chandler*, however, this Court held that the claimed need for drug testing of candidates for public office was neither substantial nor important enough to override the individual candidates' privacy interests, in the absence of individualized suspicion. *Id.* at 318. The Court's statement that the "special

needs" recognized by this doctrine were "beyond the normal need for law enforcement" and involved "concerns other than crime detection," *id.* at 313-314, must be read as a clarification that routine law enforcement investigations require individualized suspicion or probable cause to justify a search. There is no indication that this Court in *Chandler* intended to overrule *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-50 (1990), in which a sobriety roadblock program, designed to deter and detect drunken driving, was upheld as reasonable, despite the absence of individualized suspicion. The same argument was made in *Sitz*, 496 U.S. at 450, and this Court rejected any requirement that the governmental interest at stake must be outside the needs of criminal law enforcement.

D. *The Massachusetts Courts Did Not Address the Petitioners' Claims Regarding Possible Future Breaches of Confidentiality, and Such Claims Are Speculative and Non-Justiciable.*

The petitioners also argue that certiorari should be granted because of the possibility that the Act's provisions for confidentiality and restrictions on analysis and dissemination of DNA information may be breached or changed at some time in the future (Petition at 23-27).[15] Neither the Massachusetts Supreme

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[15]The protections in the Act and regulations to safeguard confidentiality and to prevent gathering unauthorized DNA information are stringent. Use of STR identity testing methods is particularly protective of privacy because STR loci do not contain functional genetic information, so they cannot reveal any characteristics of a person other than identification. *See* National Research Council, *The Evaluation of Forensic DNA Evidence* 65 (1996); Edward G. Burley, Note, *A Study in Scarlet: Criminal DNA Typing Reaches the Courts and Legislatures*, 6 J.L. & Politics 755, 823 (1990). Only identification information may be produced from the samples, and use of that information is limited to law enforcement and identification purposes. 515 C.M.R. §§2.12-2.13 (1998); Mass. Gen. Laws ch. 22E, §§ 1, 10 (1997). The DNA samples themselves may not be shared, and are stored in a secure storage room explicitly constructed for this

Judicial Court nor the Superior Court addressed these issues. *See Landry v. Attorney General*, 429 Mass. 336, 354, 709 N.E.2d 1085, 1096 (1999); memorandum of decision of Superior Court (Pet. App. at 27a-51a).

Moreover, the constitutionality of possible future legislation, and the constitutionality of the current Act in light of possible future violation of its provisions, are speculative and do not present a live controversy under Article III. *See International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (request for determination of constitutionality of statute in context of possible future conduct "involves too remote and abstract an inquiry for the proper exercise of the judicial function").

II. THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW WHERE THE ORDER SOUGHT TO BE REVIEWED, VACATING A PRELIMINARY INJUNCTION, IS MOOT BECAUSE FINAL JUDGMENT HAS ENTERED AND THE TIME FOR APPEAL HAS EXPIRED.

This case is moot because it is an interlocutory appeal from a preliminary injunction, final judgment has entered, and the time for appeal has expired. The case has thus "lost its character as a present, live controversy," *Hall v. Beals*, 396 U.S. 45, 48 (1969), and is not justiciable under Article III.

Under Massachusetts law, a preliminary injunction lapses upon entry of a final judgment. *See Judge Rotenberg Educ. Center v. Comm'r of Dep't of Mental Retardation*, 424 Mass.

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purpose. *See* Affidavit of David I. Ranieri, ¶ 16 (Resp. App. at 6a). In addition, the Supreme Judicial Court, has interpreted the Act to restrict the records that may be shared with police departments to identification information only. *Landry v. Attorney General*, 429 Mass. 336, 353 n.18, 709 N.E.2d 1085, 1096 n.18 (1999). Willful breaches of these rules are criminally punishable. Mass. Gen. Laws ch. 22E, §§ 12-13 (1997).

471, 472, 677 N.E.2d 153, 154 (1997) (appeal from preliminary injunction dismissed as moot upon entry of final judgment). Here, the preliminary injunction was issued by the Superior Court and vacated by the Supreme Judicial Court on interlocutory appeal. *Landry v. Attorney General*, 429 Mass. 336, 354, 709 N.E.2d 1085, 1096 (1999). The Supreme Judicial Court remanded the case to the Superior Court "for further proceedings consistent with this opinion." *Id.* The Superior Court then dismissed the complaint in its entirety, dismissing not only the Fourth Amendment claims that had been raised in connection with the preliminary injunction, but also a number of other federal and state constitutional and statutory claims that were not raised in the interlocutory appeal from the preliminary injunction. Judgment entered on May 26, 1999, and reconsideration was denied on July 9, 1999. *See* Resp. App., *post*, at 25a-26a. Under the Massachusetts Rules of Appellate Procedure, the time for appeal has expired. *See* Mass. R. App. P. 4 (a) (notice of appeal must be filed within sixty days of entry of judgment where the Commonwealth is a party). Where the judgment is final, issues arising on review of the order vacating the preliminary injunction are moot.

Conclusion

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS F. REILLY
Attorney General of Massachusetts

PAMELA L. HUNT*
Assistant Attorney General

CATHERINE E. SULLIVAN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

**Counsel of Record*

December 2, 1999

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 98-462

DONALD E. LANDRY, et al.,

Plaintiffs,

v.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.,

Defendants.

AFFIDAVIT OF DAVID A. RANIERI

I, David A. Ranieri, depose and state as follows:

1. I am employed as a Detective Captain in the Massachusetts Department of State Police (the "Department"). I have been a State Police officer for the past 26 years.

2. I am currently assigned as Bureau Commander of the Department's Bureau of Forensic Services. In my command are the State Police Crime Lab, State Police Crime Scene Services Section, State Police Firearms Identification Section, State Police Polygraph Section, and State Police Behavioral Science Section.

3. In my capacity as Bureau Commander, I was assigned to oversee and coordinate the efforts of the Department and other agencies involved in the implementation of G.L. c. 22E,

the State DNA Database statute, which was enacted September 30, 1997.

4. Chapter 22E provides that persons convicted of certain offenses designated in the statute are required to submit a DNA sample to the Department within ninety days of their conviction. Further, persons who have been convicted of a designated offense, notwithstanding the date of that conviction, and were incarcerated on the effective date of the statute (December 29, 1997), are required to submit a DNA sample to the Department within ninety days of the effective date. Persons on parole or probation as a result of a conviction of a designated offense are also required to submit a DNA sample to the Department within ninety days of the effective date.

5. The intent of c. 22E is to establish an identification index of DNA profiles from individuals convicted of designated offenses. Evidence recovered in conjunction with criminal investigations will be analyzed for its DNA profile and then compared to the DNA profiles included in the database in an effort to establish the identity of the perpetrator or a link with other cases.

6. Because of the ninety-day time limit imposed by c. 22E for the submission of DNA samples from certain designated offenders, an initial focus of our efforts has been to identify and notify individuals who must submit a sample, and to develop protocols and procedures for the collection of samples.

7. There are approximately 10,000 offenders who initially must submit a DNA sample pursuant to the legislation by March 29, 1998 (about 7,000 of whom are currently incarcerated). Additionally, an estimated 1,500 persons are convicted of designated offenses in Massachusetts annually. The Department of State Police has worked closely with the Department of Corrections, the Office of the Commissioner of

Probation, the Parole Board, the Criminal History Systems Board, the National Guard, and all of the county sheriffs with respect to identification and notification processes.

8. Probationers and parolees, who are being supervised in the community, were notified of their obligation to submit a DNA sample pursuant to c. 22E. Their notification provided instructions to contact the State Police Crime Lab at a toll-free telephone number (888-877-4DNA) to schedule an appointment to submit the sample. At present, National Guard sites in each region of the Commonwealth have been made available, on specific dates, for sample collection. Individuals required to submit samples have been given the opportunity to select the site and date most convenient for them and to reschedule their appointments if necessary.

9. As of this date, as a result of calls to the toll-free number, approximately 1,100 appointments have been scheduled through March 25, 1998.

10. The other focus of our efforts has been to establish protocols and procedures for the collection of DNA samples. This process has involved consultation and extensive research in connection with numerous federal and state law enforcement agencies; with Tri-Tech, Inc., the company chosen to manufacture the DNA collection kit for Massachusetts; and with scientific consultants, including Dr. Frederick Bieber and Dr. John Ballantyne. Drs. Bieber and Ballantyne recommended that the DNA collections be made by executing a simple finger stick and then spotting the blood on FTA paper. This method is scientifically valid, less intrusive for the offender than venipuncture, which is used by most other states, and provides for the easy storage of samples. Blood can be stored on FTA paper indefinitely at room temperature.

11. As a result of the research conducted and the consultations described above, protocols and procedures were developed for the collection of DNA samples.

12. The Massachusetts State Police DNA collection kit was also designed as a result of this research. The kit contains all items necessary to perform the collection and to comply with the collection procedure. Each kit includes a blue instruction sheet on which the protocols and procedures for collection are clearly described. Ten thousand of these kits have been purchased and delivered, and another five thousand have been ordered.

13. For the collection of DNA samples, the Department has contracted with two health care providers. Corrections Medical Services, Inc., of Dedham, will be responsible for collections in Department of Correction Facilities, and Health Resources, of Woburn, will be responsible for collections in houses of correction and from designated parolees and probationers. The contracts provide that all blood collection personnel must be trained and licensed in accordance with c. 22E, and that all applicable state and federal statutes, rules, and regulations relative to blood collection will be followed.

14. The Department conducted training sessions for all personnel to be involved in DNA collection, including correctional employees and personnel from Corrections Medical Services and Health Resources, on January 14, 21, 27, and 29, 1998. These sessions covered all aspects of the collection process, including the procedures and protocols for DNA collection described on the blue instruction sheets, as well as the proper marking and identification of samples for forwarding to the State Police Crime Lab.

15. Collections commenced at Department of Correction facilities on January 24, 1998, and are ongoing. Collections from probationers and parolees began February 4,

1998, at the Dorchester Armory. To date, at total of 1,254 samples have been collected.

16. At present, DNA samples are being stored at the State Police Crime Lab in Sudbury, in a secure storage room, newly constructed for the express purpose of storing DNA samples. Upon receipt, DNA samples are logged in and stored in this room in accordance with standard Crime Lab operating procedures, as described in the Department of State Police Crime Laboratory Guidelines for Submitting Evidence. Although, the DNA samples are not evidentiary in nature, they are being handled with all the care ordinarily used for the storage of evidence.

17. The State Police has not yet begun the process of analyzing DNA samples for eventual inclusion in the database. At this time, no funding has been appropriated to advance beyond the collection phase. After the appropriation of the necessary funds, it will be necessary to establish or contract with a service to conduct DNA analysis.

18. On or about April 6, 1998, Dr. John Ballantyne will join the Department as Director of the Massachusetts State Police Crime Lab. Dr. Ballantyne heads the DNA unit in the office of the Suffolk County (New York) Medical Examiner and is member of the FBI's DNA Advisory Board. Among his first duties for the Department will be to establish procedures for DNA analysis and a quality assurance program. In addition, Dr. Frederick Bieber will assume part-time duties as Director of Forensic Science.

19. All DNA analysis conducted by or for the Department will be under the direction of Drs. Ballantyne and Bieber and in compliance with procedures established by them and also in compliance with established FBI TWGDAM (Technical Working Group on DNA Analysis Methods) guidelines.

20. DNA records are no different from fingerprints. When a fingerprint is found at a crime scene, it can be compared to fingerprints which have been taken in conjunction with arrests and are sometimes stored in automated databases. Similarly, a match of a DNA profile derived as the result of the analysis of biological evidence recovered at a crime scene and a DNA profile contained in the convicted offender index can be used to establish cause to justify further investigation of a suspect.

Signed under penalties of perjury this 5th day of February, 1998,

/s/
David A. Ranieri

APPENDIX B

CODE OF MASSACHUSETTS REGULATIONS

TITLE 515: DEPARTMENT OF STATE POLICE

515 CMR 2.00: TESTING AND ANALYSIS, QUALITY ASSURANCE, COMPUTERIZED STORAGE, RETRIEVAL, AND DISSEMINATION FOR THE STATE DNA DATABASE

Current with amendments received through Register Number 867

REGULATORY AUTHORITY
515 CMR 2.00: M.G.L. c. 22E, §§ 4 and 6.

Section
2.01: Purpose
2.02: Scope and Applicability
2.03: Definitions
2.04: Forensic DNA Testing and Analysis
2.05: Quality Assurance
2.06: Verification Analysis
2.07: Security Features Preventing Unauthorized Access
2.08: Prevention of Illegal Disclosures
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2.10: Inquiry, Update or Destruction of Records
2.11: Systems' Safeguard Certification
2.12: Right of Subjects to Access and Review Records
2.13: Use and Dissemination Agreements
2.14: Mutual Exchange, Use and Storage of DNA Records
2.15: Expungement of DNA Records
2.16: Severability

2.01: Purpose

The purpose of 515 CMR 2.00 *et seq.* is to provide rules and regulations governing technical specifications for the testing and analysis of blood samples, quality assurance, and computerized storage, retrieval, and dissemination of DNA profiles in the Massachusetts DNA Database, pursuant to the terms and provisions of M.G.L. c. 22E.

2.02: Scope and Applicability

The Director of the Massachusetts State Police Crime Laboratory, under the authority of M.G.L. c. 22E, adopts 515 CMR 2.00 *et seq.* to establish rules and regulations as described in that statute.

2.03: Definitions

AFIS. Automated Fingerprint Identification System, which is a computerized database allowing for the rapid search, retrieval and comparison of fingerprints on record at the Department with those fingerprints obtained from other sources.

Allele. One of the possible alternate forms of the DNA residing at a particular genetic locus; different alleles of STR loci are distinguished by having repetitive regions that differ in length.

ASCLD/LAB. The American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Current ASCLD/LAB accreditation guidelines are contained in the most recent edition of the ASCLD/LAB Manual.

Casework Evidence DNA profile. That DNA profile of undetermined origin generated by the testing of physical evidence.

CODIS/Combined DNA Index System. The Federal Bureau of Investigation's national DNA identification index system which facilitates the storage and exchange of DNA records submitted by state and local criminal justice and law enforcement agencies.

Positive Control Sample. A reference DNA sample available from the National Institute for Standards and Technology for which the DNA STR profile is known, and which is used to demonstrate acceptable performance of DNA STR tests.

Convicted Offender DNA Profile. That DNA profile generated by testing of a blood sample collected from a designated offender convicted of one of the crimes listed in M.G.L. c. 22E, §3.

Convicted Offender Index. The electronic database containing DNA STR profiles generated from Massachusetts offenders convicted of one of the crimes listed in M.G.L. c. 22E, §3, stored in the State DNA Index System (SDIS).

Crime Laboratory. Massachusetts State Police Crime Laboratory of the Department of State Police.

Database Coordinator. An employee of the Department responsible for, among other duties, ensuring that all administrative requirements related to the DNA Database (as enumerated in 515 CMR 2.00 *et seq.*) are met by all participant laboratories and user agencies.

Department. The Department of State Police.

Director. The Director of the Massachusetts State Police Crime Laboratory, or his or her designee.

DNA. Deoxyribonucleic acid.

DNA Database. The DNA identification records system maintained and administered by the Director.

DNA Profile. The list of alleles carried by a particular individual at a specified set of genetic loci.

DNA Record. DNA information that is derived from a DNA sample and DNA analysis and is stored in the state DNA database, or in CODIS including all records pertaining to DNA analysis but not including the DNA sample itself.

DNA Sample. Biological evidence of any nature from which DNA is recovered and subjected to DNA analysis.

FBI. Federal Bureau of Investigation.

Forensic DNA Testing. Any test that employs techniques to examine DNA derived from the human body for the purpose of providing information to resolve issues of identification.

Forensic Index. The electronic database containing DNA STR profiles generated from casework evidence, stored in the SDIS.

Loci. A group of genes or other DNA elements occupying specific locations on one or more of the chromosomes of a particular species.

Mass Disaster. A catastrophic event resulting in a large number of deaths.

Missing Person. A person reported as such in a report to a law enforcement authority.

NDIS. As developed by the FBI, refers to the National DNA Index System, and is comprised of uploaded casework ("forensic") profiles and convicted offender DNA profiles from across the United States.

Negative Amplification Blank. A negative control sample containing amplification reagents without added DNA, which is used to detect DNA contamination of the amplification reagents during this testing.

Negative Control. A specimen included in a batch of specimens which, when tested using DNA testing methods, should give rise to negative test results.

Negative Reagent Blank. A negative control sample containing all testing reagents without added DNA, which is used to detect DNA contamination of any reagent during this testing.

SDIS. As developed by the FBI, refers to the State DNA Index System, and is comprised of uploaded casework ("forensic") and convicted offender DNA records, and DNA records for missing persons.

SDIS Index Custodian. An employee of the Department responsible for, among other duties, maintaining the SDIS, fulfilling technical requirements of CODIS, and proper operation of the computer hardware on which the DNA Database resides. The SDIS Index Custodian and Database Coordinator may be the same person.

STR/Short Tandem Repeat. A form of testing which provides DNA profiles for loci which contain simple DNA unit repeats.

TWGDAM. Technical Working Group on DNA Analysis Methods within the FBI.

2.04: Forensic DNA Testing and Analysis

(1) STR Testing: The DNA Database shall be comprised of data generated from STR testing. The specific tests to be adopted for such use shall include all STR loci approved for use by the Director. The FBI-sponsored Short Tandem Repeat (STR) Standardization Project's set of core loci, required for participation in NDIS, is required for inclusion of a DNA profile for a convicted offender in the DNA Database.

(2) Analysis: Forensic DNA profiles to be maintained in the DNA Database must be comprised of information for at least six of the set of core loci. This requirement for a minimum of six loci applies only to those forensic DNA profiles which the Crime Laboratory desires to have maintained in the forensic index of the DNA Database. The requirements for a minimum number of loci needed to perform a casework search of the DNA Database are set forth herein at 515 CMR 2.14. The Crime Laboratory shall only add to the DNA Database Casework Evidence DNA Profiles, Convicted Offender DNA profiles, or profiles generated from analyses of DNA recovered from unidentified human remains.

2.05: Quality Assurance

Quality Assurance will be accomplished through compliance with laboratory accreditation standards as

promulgated by the FBI's TWGDAM, pursuant to 42 U.S.C. § 13132(b), as updated.

2.06: Verification Analysis

(1) Positive Control Sample. In addition to compliance with TWGDAM standards, accuracy and completeness of all DNA records maintained as part of the DNA Database will be assured through compliance by the Crime Laboratory with the requirements for submission of a positive control sample with each profile or group of profiles. Each DNA profile (for either convicted offender or forensic samples) must be associated with a positive control sample. Before STR data may be entered into the DNA Database, the SDIS Index Custodian shall verify the affiliated positive control values against the acceptable values. The positive acceptability values applied shall be those determined and approved by the Director. In addition, the Crime Laboratory must certify that each DNA profile is associated with two negative controls (Negative Amplification Blank and Negative Reagent Blank) for which no activity was observed during analysis.

(2) Rejection. If the positive control values are not acceptable, the SDIS Index Custodian shall notify the Database Coordinator who shall notify the agency from which the DNA data was submitted. Rejection of positive control values shall be recorded in a Positive Control Verification Log in a form prescribed by the Director.

2.07: Security Features Preventing Unauthorized Access

(1) Security Features. The server on which the DNA Database resides shall be located in a secure area to minimize unauthorized physical access. The Crime Laboratory shall choose software and hardware designs

which prevent unauthorized access to DNA records, and must have a written Information Systems Plan which specifies the architecture of the laboratory's computer hardware and the structure of security features comprising the access control component of the computer software employed. The Information Systems Plan must demonstrate that an electronic audit trail is maintained for activities related to the entering or editing of DNA records.

(2) Systems Plan. A final Information Systems Plan shall be submitted by the Crime Laboratory for review and approval by the Department prior to the laboratory implementing the DNA Database. The Department shall determine the acceptability of the Information Systems Plan.

(3) Participation in CODIS. The Information Systems Plan components must be designed and applied in such a way as to allow the Crime Laboratory to participate in the federal CODIS program.

2.08: Prevention of Illegal Disclosures

(1) Annual Audit. At least once per year, an audit of the Crime Laboratory will be conducted by the Department to assure that no illegal disclosures of DNA records have taken place. Each audit will consist of administrative review of a random group of at least 10% of the Crime Laboratory's DNA Database search requests generated during the period since the last audit.

(2) Audit Parameters. This audit will verify that all necessary documents required for accessing and controlling DNA records and their associated information have been appropriately completed. These documents

include, but are not limited to: use and dissemination agreements between the Crime Laboratory and user agencies or the Department; search request forms; and search result forms. The Department may develop a standardized audit checklist to assist in completion of the required audits.

2.09: Restriction of Access to Information Systems

Access to record information system facilities, systems operating environments and data file contents (whether while in use or when stored in a media library) shall be restricted to authorized personnel only. These restrictions shall be assured through compliance by the laboratory with specific laboratory accreditation criteria of the current ASCLD/LAB manual governing security.

2.10: Inquiry, Update or Destruction of Records

(1) Restrictions of Access. Inquiries, updates, or destruction of DNA records in the DNA Database shall only be made by authorized sources of inquiry, update, or destruction. Inquiries related to DNA records in the DNA Database may be accepted only from a subject of the DNA Database (see 515 CMR 2.12); an agency authorized to make such inquiry pursuant to a properly executed use and dissemination agreement (see 515 CMR 2.13); or the FBI (see 515 CMR 2.14).

(2) Record keeping. Update or destruction of records shall only be made by an authorized agent of the Crime Laboratory or its designee. Any update to, or destruction of, a DNA record in the DNA Database shall be recorded in a log following an electronic or hard copy form prescribed by the Director.

2.11: Systems' Safeguard Certification

(1) Certification. Operational programs shall be used to detect and store for the output of the Department or its designee all unauthorized attempts to penetrate the DNA Database. The Department shall certify that the DNA Database hardware and software architecture has been appropriately designed, implemented and safeguarded to eliminate the realistic chance that such unauthorized attempts to penetrate the DNA Database could go undetected. This certification shall be made based on conformance of the DNA Database with all appropriate portions of appropriate CODIS standards.

(2) Record keeping. The Department shall maintain this certification in a file with the written Information Systems Plan (see 515 CMR 2.07). A current certification must be on file at the Department at all times.

2.12: Right of Subjects to Access and Review Records

(1) Subject Request for Access. All requests for access to and review of records relating to a subject of the DNA Database, by such subject, will be reviewed on a case-by-case basis by the Director. In reviewing and responding to the request, the following steps shall be followed:

(a) The subject must provide in writing his/her name; any aliases used; Date of Birth; Social Security Number; Sex; Race; Date of sentence for the index offense (if known); the jurisdiction of the Court which sentenced the subject (if known); imprints of the right thumbprint having sufficient clarity to allow for AFIS processing; a passport-

sized color photograph taken within the past 12 months; current address; and current phone number (if available). This information must be submitted under the subject's signature and seal of a registered Notary with the following authentication statement: "I [name] on oath depose and state that the information I am providing to the Director of the Massachusetts State Police Crime Laboratory regarding my identity is true and accurate."

(b) The Director will verify whether a blood specimen was ever collected from an individual corresponding to such information provided in 515 CMR 2.12(a). If needed, the Director shall use other computerized databases within the authority of or available to the Department to assist in fulfilling the subject's request.

(c) If no record is found using this information, or if there is any discrepancy discovered in the information submitted by the subject in the request, no information related to the DNA Database will be provided to the subject. The subject will be notified of this decision by the Director in writing within 30 days, by certified or registered mail, return receipt requested.

(d) If a record is found for the identified subject in the DNA Database and no discrepancies are identified in the submitted information, a photocopy of the DNA Database submission form and the results of the DNA analysis for the subject will be noted. The Director will forward this information with a written letter of authentication

within 30 days, by certified or registered mail, return receipt requested.

(2) Appeal. If, due to discrepancies in the information submitted by the subject in the request, DNA records and related information are not provided to the subject by the Director, the subject is allowed to appeal the decision. In order to appeal the Director's decision, the subject must provide, in writing and under signature and the seal of a registered Notary, the nature of the subject's disagreement with the Director's decision. This appeal document shall be submitted to the Department, which shall take appropriate action to review the merits of the appeal and present a final decision on the appeal in writing within a reasonable period. In the event such decision reverses or modifies that of the Director, the Department shall require that appropriate action be taken with respect to the subject's record.

2.13: Use and Dissemination Agreements

(1) Authorized Agencies. Access to the DNA Database shall be granted to an agency authorized to have such access, pursuant only to a written use and dissemination agreement. As long as consistent with 42 U.S.C. §14132, stored DNA samples and DNA analyses can be disclosed only:

(a) to criminal justice agencies for law enforcement identification purposes, which shall include (at the discretion of the Director) to assist the identification of human remains from mass disasters or to identify whether such remains are from those of a missing person, upon written or electronic request to the Director;

(b) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;

(c) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; and

(d) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

(2) Record keeping. A copy of each current use and dissemination agreement shall be filed with the Crime Laboratory and maintained in a file for each participant agency at all times. The form of the agreements shall be determined by the Department.

(3) Requirement in the Use and Dissemination Agreement. The use and dissemination agreement shall specify:

(a) Duties of the Director to provide the requested access and information to authorized parties;

(b) Duties of the user agency to receive, store and use all information covered by the agreement in compliance with all applicable State and federal laws and regulations;

(c) Duties of the user agency to familiarize all personnel and adhere to all regulations governing the receipt, storage and use of all information covered in the agreement;

(d) Duties of the user agency to maintain records that support and justify inquiries and requests for DNA Database searches, and make these records available to the Department during periodic audits performed by the Department;

(e) Prohibitions on redisclosure by the user agency of any information obtained from the DNA Database to any unauthorized agency or person;

(f) Specific policy for suspension of access, cancellation of access and/or fines for any violations of the terms and conditions of the use and dissemination agreement by a user agency, its employees or agents, and a policy for reinstating access or service by the Department only after the Department is satisfied that the causes of all violations have been eliminated;

(g) Specific instructions allowing termination by either party of the agreement for any reason, with 30 days notice; and

(h) Notice that the agreement shall take effect only after officials of the Crime Laboratory and user agency having both the administrative and legal authority to bind the parties to the terms and conditions of the agreement have signed the use and dissemination agreement.

2.14: Mutual Exchange, Use and Storage of DNA Records

(1) Mutual Exchange, Use and Storage. Mutual Exchange, Use and Storage of DNA records within the DNA Database with the system of DNA identification by the FBI shall be allowed, provided that:

(a) The Department determines that such exchange, use and storage are consistent with the provision of applicable provisions of Massachusetts law;

(b) Applicable requirements enumerated within 515 CMR 2.04 through 2.15 have been met; and

(c) A memorandum of understanding has been executed between the Director and the federal CODIS program administrator.

(2) Loci Requirements. For purposes of searches of the DNA Database, a minimum of four loci shall be provided by a laboratory or other authorized agency requesting a casework (forensic) search against the DNA Database. Notwithstanding this requirement, the laboratory or other authorized agency may, at its discretion, request that a search be performed using fewer loci if there are scientific reasons which support using fewer than four loci in a particular case, including but not limited to the apparent presence of mixtures, sample degradation, limited sample availability, or the possible involvement of relatives. The opinion that such "scientific reason(s)" are operative in a case must be affirmed on the search request form whenever fewer than four loci are provided with a casework search request.

2.15: Expungement of DNA Records

(1) Expungement. Upon receipt of a court order pursuant to M.G.L. c. 22E, § 15, with respect to a subject whose DNA record resides in the DNA Database such record may be expunged in accordance with M.G.L. c. 22E, § 15. If the Director is so notified:

(a) The Director shall verify whether a blood specimen was ever collected from an individual with personal identifying data which corresponds with information provided in 515 CMR 2.12(1)(a). If needed, the Director shall use other computerized databases within the authority of, or available to, the Director to assist in fulfilling the subject's request.

(b) If no record is found using this information, or if there is any discrepancy discovered in the information submitted by the subject or his or her representative in the request, the Director shall notify the subject in writing within 30 days, setting forth reasons why documents were not returned and requesting additional information, if appropriate, by certified or registered mail, return receipt requested.

(c) If a record is found for the identified subject in the DNA Database and no discrepancies are identified in the submitted information, the Director shall determine the location and extent of all documents related to the subject's DNA record. The list of documents identified in this search will be communicated by the Director to the subject in writing within 30 days of the notification of need for expungement, by return receipt requested mail. In this same letter, the Director shall define for the subject the expected time needed to obtain all copies of all documents to be returned to the subject. The time to obtain and return these records to the subject shall not exceed 120 days from the date of notification of the need for expungement unless exigent circumstances can be documented.

(d) The Director shall thereafter obtain all documents related to the subject's DNA Database record. After insuring that all documents, and all copies thereof, have been obtained, these records shall be catalogued (but no copies of the actual documents shall be made). These documents shall be forwarded to the subject of the expungement using return receipt requested mail.

(e) The catalogue of the documents returned to the subject or the subject 's representative shall be maintained with documentation of notification of the need for expungement and all related correspondence between the Director and the subject in a file at the Crime Laboratory.

(2) Sealed File. After completion of all activities by the Director related to this expungement, this file shall be sealed and maintained by the Crime Laboratory indefinitely and shall not be opened except pursuant to an order of a court of competent jurisdiction.

2.16: Severability

If any article, section, subsection, sentence, clause or phrase of 515 CMR 2.00 *et seq.* is for any reason determined to be unconstitutional, contrary to statute, in excess of authority, or otherwise inoperative, such determination shall not affect the validity of any other article, section, subsection, sentence, clause or phrase of 515 CMR 2.00 *et. seq.*

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

DOCKET#MICV98-00462A

RE: Landry et al v Harshbarger et al
TO: Gregory I Massing
Mass Atty General's Office
1 Ashburton Place
Criminal Bureau
Boston MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on 05/26/99 the following entry was made on the above referenced docket:

> JUDGMENT: "the preliminary injunction (of GL c 22E, Sections 1-15) cannot be justified on the grounds relied upon by the (Superior Court) judge, and that it also cannot be supported on the basis that the reasonable force provision (sec 4 (a)) is unlawful in the absence of regulations on the matter. Accordingly, we vacate the preliminary injunction." Id. The complaint is hereby ordered DISMISSED. FORM OF JUDGMENT APPROVED. (Zobel, J.) copies sent 5/26/99

Dated: 26th of May, 1999

Edward J Sullivan
Clerk of the Courts

BY: George M Loiacono, Asst Clerk
Telephone: 617-494-4010 EXT 4341

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

CIVIL DOCKET# MICV98-00462A

RE: Landry et al v Harshbarger et al

TO: Rosemary S Gale
Mass Atty General's Office
1 Ashburton Place
Criminal Bureau
Boston MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 07/09/99 is as follows:

Motion of pltffs to reconsider judgment and order of May 26, 1999.

Motion #49 of Pltffs To Reconsider (judgment and order of May 26, 1999) is: DENIED. (Zobel, J.) notices sent 7/9/99

Dated at Cambridge, Massachusetts this 9th of July, 1999.

Edward J Sullivan
Clerk of the Courts

BY: George M Loiacono, Asst Clerk
Location: Rm 12A (Cambridge)
Telephone: 617-494-4010 EXT 4341